

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

RICHARD L. MITCHELL,
Plaintiff,
v.

Case No. 2:18-cv-00646-RFB-EJY

ORDER

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, *et al.*,

14 Before the Court are cross Motions for Summary Judgment (ECF Nos. 177, 182) as well as
15 Plaintiff's "Motion for Newly Discovered Information Regarding Arrest Protocol."¹ (ECF No.
16 199). For the following reasons, the Court denies Plaintiff's Motions and grants Defendants'
17 Motion.

I. FACTUAL BACKGROUND

19 The Court makes the following findings of undisputed facts and finds that there are no
20 genuine disputes of material fact.

21 On the morning of December 9, 2017, Plaintiff Richard Mitchell entered a Speedee Mart
22 gas station in Las Vegas. He walked up to the cashier, placing a black bag over the register. A
23 handwritten note was attached to it: "put the money in here." The cashier threw the bag and told
24 Mitchell to leave. Mitchell turned to pick up the bag and leave, but before doing so, he turned back
25 to the cashier and said, "what if I had a gun?" The cashier dialed the police as Mitchell exited.

²⁸ ¹ Given Mr. Mitchell's *pro se* status, the Court construes his "Motion for Newly Discovered Information" as a motion to supplement the summary judgment record pursuant to FRCP § 56(e)(1). See Chavez v. Robinson, 817 F.3d 1162, 1167 (9th Cir. 2016) (holding that courts liberally construe *pro se* motions).

1 placed the same bag and note in front of the cashier, who told Mitchell that she could not open the
2 register. While leaving to retrieve her manager, Mitchell proceeded behind the counter and
3 attempted to open the register. Without success, he left the store. After his exit, the cashier spoke
4 with her assistant manager, who subsequently dialed the police.

5 Mitchell did not steal anything from these convenience stores, and no dangerous weapon
6 was displayed by Mitchell.

7 As a result of the CVS employee's call to the police, Las Vegas Metropolitan Police
8 Department Dispatch requested officers to search for a suspect. Dispatch indicated that "a male
9 demanded money, but didn't make any threats, then went behind the counter with a black bag and
10 didn't take anything[.]" Sergeant Miguel Garcia ("Sgt. Garcia") responded. He drove to the CVS
11 to review footage of Mitchell's attempted robbery. En route, Sgt. Garcia learned from dispatch
12 that the CVS attempted robbery call was related to an earlier robbery attempt at a Speedee Mart.
13 Regarding this attempt, dispatch informed Sgt. Garcia that the suspect "said he had a [gun] but
14 none was seen." After communication with officers investigating the Speedee Mart attempted
15 robbery, who sent Sgt. Garcia screen images of the Speedee Mart surveillance video, he
16 determined that the suspect in both attempted robberies was the same individual. Police dispatch
17 broadcasted a request for officers to patrol nearby convenience stores in search of the suspect.

18 Officers Miramontes and Jegge located Mitchell at a Terrible Herbst's convenience store
19 ("Terrible's") by matching his vehicle description with dispatch's report. The officers parked
20 behind Mitchell's stationary car in front of the Terrible's. Both officers and Mitchell exited
21 simultaneously, standing approximately fifteen feet apart from each other. Officer Miramontes
22 exited with his firearm drawn and Officer Jegge, his taser. Mitchell had exited his car carrying a
23 baseball bat.

24 Immediately, Officer Miramontes began commanding Mitchell to drop the bat. Mitchell,
25 on the other hand, responded with questions about why the officers had stopped him. A minute
26 into the encounter, Miramontes radioed to dispatch: "we're giving commands but he's refusing to
27 drop the baseball bat." Miramontes then addressed some of Mitchell's questions: "listen, man,
28 you've been seen going around to different places, asking for money." Throughout, Mitchell

1 continued to hold the bat. During this time, supporting officers began arriving at the Terrible's.
 2 Soon, Mitchell was surrounded by ten to thirteen officers and their vehicles. One of these officers
 3 was Defendant Stephens, who arrived just over a minute into the encounter.

4 Officer Stephens exited his police vehicle with a beanbag shotgun drawn. Officers
 5 continued their commands and Mitchell's noncompliance was unchanged. About a minute and
 6 forty seconds from the initial stop, Stephens warned Mitchell: "if you do not put it down, I will
 7 shoot you and it will hurt!" Mitchell still did not drop the bat. He was standing near his car on the
 8 side of the store where there was an entrance and exit.

9 About two and a half minutes into the encounter, Sgt. Garcia, who had not yet arrived at
 10 the Terrible's, radioed to Officer Stephens: "if he's not obeying commands, beanbag him and make
 11 him drop the bat." A moment later, Officer Stephens yelled, "put it down, put it down!" and
 12 subsequently warned: "Beanbag! Beanbag! Beanbag!" Four "beanbags" from the shotgun struck
 13 Mitchell. He had been approximately 25 feet from Officer Stephens when he was hit. Sgt. Garcia
 14 arrived and exited his vehicle after the third beanbag round.

15 Mitchell reacted adversely to the beanbags. He kicked his legs and moved back toward the
 16 sidewalk and in front of the doors to the Terrible's. Subsequently, he wielded the bat in a swinging
 17 stance and struck the glass door twice. While the officers continued with their commands to drop
 18 the bat, Mitchell yelled: "Come on, man! Really! Come on, man!"

19 In the meantime, Officer Stephens announced that he was reloading the beanbag shotgun.
 20 Again, he yelled: "Beanbag! Beanbag! Beanbag!" This time, however, the rounds did not deploy.
 21 At this point, Mitchell opened the door to the Terrible's. Four gunshots rang out in two seconds.
 22 Garcia and Mitchell were separated by approximately 35 feet when he fired his weapon. Mitchell
 23 suffered a through and through gunshot wound above his right knee.

24 **II. PROCEDURAL HISTORY**

25 Plaintiff Mitchell, acting *pro se*, attached a complaint to his application to proceed *in forma*
 26 *pauperis* on April 10, 2018. ECF No. 1. On October 23, 2020, Mr. Mitchell filed an amended
 27 complaint, naming Officer Stephens and Sgt. Garcia as defendants. ECF No. 18. On February 1,
 28 2021, Mr. Mitchell filed the Operative, Second Amended Complaint ("SAC"). ECF No. 22. On

1 March 3, 2021, the Honorable Elayna J. Youshah, U.S. Magistrate Judge, screened the SAC and
 2 allowed Plaintiff's Fourth Amendment excessive force claims against Defendants Garcia and
 3 Stephens to proceed. ECF No. 23. On May 11, 2021, the Court accepted and adopted the Report
 4 and Recommendation in full. ECF No. 33.

5 After numerous extensions of time from both parties, Defendant Garcia moved for
 6 summary judgment on August 10, 2022. ECF No. 107. On the same day, Mr. Mitchell filed a
 7 "dispositive motion." ECF No. 105. At its hearing on the motion on March 23, 2023, the Court
 8 found *inter alia* that Defendant Stephens was not properly served and therefore stayed the case.
 9 ECF No. 123. On January 9, 2024, discovery was reopened. ECF No. 159.

10 Defendants Garcia and Stephens filed their instant Motion for Summary Judgment on May
 11 24, 2024. ECF No. 177. The same day, Plaintiff filed another "dispositive motion." ECF No. 176.
 12 Given Plaintiff's *pro se* status, the Court noted deficiencies with the motion and extended the
 13 dispositive motion deadline. ECF No. 180. On June 13, 2024, Plaintiff filed his instant Motion for
 14 Summary Judgment. ECF No. 182. Both motions are fully briefed. ECF Nos. 183, 184, 185, 186,
 15 187. On February 5, 2025, Mitchell filed a motion requesting the Court to consider newly
 16 discovered information for purposes of summary judgment. ECF No. 199. On February 19, 2025,
 17 Defendants responded. ECF No. 200. The Court's Order follows.

18 **III. LEGAL STANDARD**

19 **A. Summary Judgment**

20 Summary judgment is appropriate when the pleadings, depositions, answers to
 21 interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no
 22 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."
 23 Fed. R. Civ. P. 56(a); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When considering
 24 the propriety of summary judgment, the court views all facts and draws all inferences in the light
 25 most favorable to the nonmoving party. *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir.
 26 2014). If the movant has carried its burden, the non-moving party "must do more than simply show
 27 that there is some metaphysical doubt as to the material facts. Where the record taken as a whole
 28 could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for

1 trial.” Scott v. Harris, 550 U.S. 372, 380 (2007). It is improper for the Court to resolve genuine
 2 factual disputes or make credibility determinations at the summary judgment stage. Zetwick v.
 3 County of Yolo, 850 F.3d 436, 441 (9th Cir. 2017).

4 The standard of review does not change when parties cross-move for summary judgment.
 5 See United States v. Fred A. Arnold, Inc., 573 F.2d 605, 606 (9th Cir. 1978). Thus, when faced
 6 with cross-motions for summary judgment on the same claims, the Court must “consider the
 7 appropriate evidentiary material identified and submitted in support of both motions, and in
 8 opposition to both motions, before ruling on each of them.” Tulalip Tribes of Washington v.
 9 Washington, 783 F.3d 1151, 1156 (9th Cir. 2015) (quoting Fair Hous. Council of Riverside Cnty.,
 10 Inc. v. Riverside Two, 249 F.3d 1132, 1134 (9th Cir. 2001)). The Court “rule[s] on each party’s
 11 motion on an individual and separate basis, determining, for each side, whether a judgment may
 12 be entered in accordance with the Rule 56 standard.” Id. Both parties in each instance receive the
 13 benefit of all reasonable inferences. ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097 (9th
 14 Cir. 2003). When opposing parties tell two different stories, one of which is blatantly contradicted
 15 by the record, so that no reasonable jury could believe it, a court should not adopt that version of
 16 the facts for purposes of ruling on a motion for summary judgment. Scott v. Harris, 550 U.S. 372,
 17 380 (2007).

18 **B. Motion to Supplement the Record**

19 “If a party fails to properly support an assertion of fact or fails to properly address another
 20 party’s assertion of fact . . . the court may . . . give an opportunity to properly support or address
 21 the fact.” Fed. R. Civ. P. 56(e)(1). Whether to permit supplementation of the summary judgment
 22 record is within the sound discretion of the district court. See Resilient Floor Covering Pension Tr.
 23 Fund. Bd. of Trs. v. Michael’s Floor Covering, Inc., 801 F.3d 1079, 1088 (9th Cir. 2015).

24 **IV. DISCUSSION**

25 Mr. Mitchell brings two 42 U.S.C. § 1983 claims alleging as excessive the use of force
 26 employed by Officer Stephens and Sgt. Garcia on December 9, 2017, in violation of the Fourth
 27 Amendment. Before considering the cross-motions on the merits, the Court briefly addresses a
 28 threshold challenge under Heck v. Humphrey.

1 **A. Mitchell's Claims are not Barred by Heck v. Humphrey**

2 As a threshold matter, Defendants assert that Mitchell's excessive force claims are barred
 3 under Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Heck stands for the rule that "when a state
 4 prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in
 5 favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it
 6 would, the complaint must be dismissed[.]" Id. Defendants argue that success on Mitchell's claims
 7 would necessarily imply the invalidity of his conviction in state court to resisting arrest with a
 8 dangerous weapon. It necessarily implies as such, they argue, because an individual may only be
 9 convicted for resisting a lawful arrest.

10 Mitchell's § 1983 excessive force action is barred by Heck if the force that he challenges as
 11 unlawful is the same force that he was convicted of resisting. Martell v. Cole, 115 F.4th 1233,
 12 1234 (9th Cir. 2024). Applying this analysis "requires looking at the factual basis for a conviction,
 13 regardless of whether that conviction is based on a jury verdict or a guilty plea." Lemos v. Cnty.
 14 of Sonoma, 40 F.4th 1002, 1008 (9th Cir. 2022) (*en banc*). Heck is no impediment "when the
 15 conviction and the § 1983 claim are based on different actions during 'one continuous
 16 transaction.'" Hooper v. Cnty. of San Diego, 629 F.3d 1127, 1134 (9th Cir. 2011).

17 In this case, nothing on the record clearly demonstrates the underlying factual circumstance
 18 of resistance to which Mitchell pleaded guilty. In other words, Mitchell's guilty plea is not
 19 predicated on a specific conduct of resistance. Accordingly, Mitchell's resistance with a dangerous
 20 weapon against Officer Miramontes might have been after any allegedly excessive force was
 21 used, e.g., when he had fallen to the ground in the Terrible's while the bat remained in his hand.
 22 Given this possibility, the Court finds that Mitchell's success in this action would not necessarily
 23 imply the invalidity of his conviction. See Sanders v. City of Pittsburg, 14 F.4th 968, 971 (9th Cir.
 24 2021) (finding that "if the alleged excessive force occurred *before* or *after* the acts that form the
 25 basis of the [resisting arrest] [state law] violation, even if part of one continuous transaction, the §
 26 1983 claim doesn't 'necessarily imply the invalidity of a criminal conviction[.]'").

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28

B. Cross-Motions for Summary Judgment²

The Court next turns to the merits of the cross-motions for summary judgment on both of Mitchell’s excessive force claims. Both of Mitchell’s claims are brought under § 1983, which provides a private right of action for the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. 42 U.S.C. § 1983. To prevail on these claims, Mitchell must establish two essential elements: (1) the violation of a right secured by the United States Constitution, and (2) that the alleged violation was committed by a person acting under color of state law. Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991). The second prong, whether Defendants acted under color of state law, is undisputed. See also Boer-Sedano v. Gonzales, 418 F.3d 1082, 1088 (9th Cir. 2005) (explaining that police officers are “prototypical” state actors).

The parties thus move for summary judgment as to the first prong, whether Defendants violated Mitchell's Fourth Amendment protection against excessive force. Claims of excessive force are analyzed under the Fourth Amendment's "objective reasonableness" standard. Graham v. Connor, 490 U.S. 386, 395-97 (1989). Under this standard, "the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397. In determining whether a particular use of force was unreasonable and thus in violation of the Fourth Amendment, a court considers the severity of the intrusion on the individual's Fourth Amendment rights, the government's interest in the use of force, and the balance between the gravity of the intrusion on the individual and the government's need for that intrusion. Miller v. Clark Cnty., 340 F.3d 959, 964 (9th Cir. 2003).

Here, Mitchell contends that the undisputed facts render Officer Stephens' and Sgt. Garcia's uses of force objectively unreasonable, while Defendants argue that the same facts demonstrate that the force employed was objectively reasonable. Using the "objective reasonableness" test, the Court first considers whether the factual circumstances underlying each use of force entitle either party to summary judgment. In other words, the Court considers whether

² In his motion to supplement the summary judgment record, Mitchell requests the Court to consider “newly discovered information.” Namely, Mitchell cites the fact that the officers, before using force, did not tell Mitchell that he was under arrest. Because this information was on the record before Mitchell filed his motion, the Court denies the motion to supplement as moot as it has considered Mitchell’s arguments. See *Resilient Floor*, 801 F.3d at 1088.

1 each party successfully raises genuine issues of material fact in opposition to the others' motion
 2 for summary judgement, so as to preclude the Court's determination of reasonableness as a matter
 3 of law. Where, as here, camera footage captures the subject incident, the Court "view[s] the facts
 4 in the light depicted by the videotape." See Scott v. Harris, 550 U.S. 372, 378, 380-81 (2007). To
 5 the extent that a fact is not clearly established by video, the Court views the evidence "in the light
 6 most favorable to the nonmoving part[ies]." Id. at 380.

7 Importantly, "the objective reasonableness analysis must be conducted separately for each
 8 search or seizure that is alleged to be unconstitutional." City of Los Angeles v. Mendez, 581 U.S.
 9 420, 428 (2017). Here, Mitchell alleges that Officer Stephens' use of less-lethal force and Sgt.
 10 Garcia's use of lethal force independently constituted violations of his constitutional rights.
 11 Accordingly, the Court conducts the analyses for each use of force in turn. For the following
 12 reasons, the Court finds that (1) the use of less-lethal force and (2) the use of lethal force were
 13 objectively reasonable as a matter of law.

14 After finding as such, the Court need not determine whether Defendants are entitled to
 15 qualified immunity. See, e.g., Aguilera v. Baca, 510 F.3d 1161, 1167 (9th Cir. 2007) (noting that
 16 if no constitutional violation occurred the court need not decide whether qualified immunity
 17 applies).

18 **i. *Stephens' Use of Less-Lethal Force***

19 The Court turns to the merits of the cross-motions relating to Defendant Stephens' use of
 20 a beanbag shotgun. Specifically, the Court balances "the gravity of the intrusion on the individual
 21 against the government's need for that intrusion . . . to determine whether the force used was
 22 'greater than is reasonable under the circumstances.'" Espinosa v. City & County of San Francisco,
 23 598 F.3d 528, 537 (9th Cir. 2010) (citation omitted).

24 **1. *Quantum of Force***

25 The Court finds that the deployment of the beanbag shotgun constituted a significant
 26 encroachment upon Mitchell's liberty interests. The severity or gravity of the intrusion is assessed
 27 "by considering the type and amount of force inflicted." Thompson v. Rahr, 885 F.3d 582, 586
 28 (9th Cir. 2018). Here, Officer Stephens fired four rounds from a beanbag shotgun, all of which

1 struck Mitchell. This less-lethal weapon is “a twelve-gauge shotgun loaded with . . . ‘beanbag’
 2 round[s],” which consist of “lead shot contained in a cloth sack.” Deorle v. Rutherford, 272 F.3d
 3 1272, 1277 (9th Cir. 2001). In Deorle, the Ninth Circuit observed that the euphemism “beanbag”
 4 “grossly underrates the dangerousness of this projectile,” which “can kill a person if it strikes his
 5 head or the left side of his chest at a range of under fifty feet.” Id. at 1279 & n.13. In light of this
 6 weapon’s dangerous capabilities, “[s]uch force, though less than deadly, . . . is permissible only
 7 when a strong governmental interest compels the employment of such force.” Id. at 1280.

8 2. *Governmental Interest*

9 The Court turns to the factors used to weigh the government’s interest in using the beanbag
 10 shotgun. Governmental interest in using force is evaluated “by assessing (1) the severity of the
 11 crime; (2) whether the suspect posed an immediate threat to the officers’ or public’s safety; and
 12 (3) whether the suspect was resisting arrest or attempting to escape.” Espinosa, 598 F.3d at 537
 13 (quoting Graham, 490 U.S. at 396). These factors, however, are not exclusive. See Bryan v.
 14 MacPherson, 630 F.3d 805, 826 (9th Cir. 2010). Courts “examine the totality of the circumstances
 15 and consider ‘whatever specific factors may be appropriate in a particular case, whether or not
 16 listed in Graham.’” Id. (quoting Franklin v. Foxworth, 31 F.3d 873, 876 (9th Cir. 1994)). Other
 17 factors relevant to the reasonableness of the force used include “the availability of less intrusive
 18 alternatives to the force employed, whether proper warnings were given and whether it should
 19 have been apparent to officers that the person they used force against was emotionally disturbed.”
 20 Isayeva v. Sacramento Sheriff’s Dep’t., 872 F.3d 938, 947 (9th Cir. 2017).

21 The Court makes the following findings of law relevant to the government’s interest in
 22 using force under the factual circumstances of this case.

23 a. Mitchell Posed an Immediate Threat³

24 The “most important” Graham factor is whether the individual posed an “immediate threat

25 ³ Mitchell advances arguments related to the fact that he had been under the influence of drugs and alcohol.
 26 However, the Court’s analysis looks to “objective” factors “from the perspective of a reasonable officer on the
 27 scene[.]” Graham v. Connor, 490 U.S. 386, 396 (1989). In doing so, the Court finds that the video record here
 28 “blatantly contradicts” Mitchell’s contention that his near “mental and physical breakdown” was “obvious” to officers.
See Scott, 550 at 380 (courts view facts in the light depicted by the record where it blatantly contradicts a party’s
 version of the facts). Though this question might be material to the Court’s analysis, the Court does not find any
 genuine dispute. See Deorle, 272 F.3d at 1283 (holding that whether it is or should be apparent to officers that an
 individual is emotionally disturbed “is a factor that must be considered”).

1 to the safety of the officers or others.” Glenn, 673 F.3d at 872. But “[a] simple statement by an
2 officer that he fears for his safety or the safety of others is not enough; there must be objective
3 factors to justify such a concern.” Deorle, 272 F.3d at 1281. Defendants argue that Mitchell posed
4 an immediate threat by wielding, and refusing to drop, a baseball bat in a public space. Mitchell,
5 on the other hand, argues that he did not pose a threat, that he had only planned to use the bat to
6 prop up the hood of his car’s engine and that he held onto it from fear and confusion as a result of
7 his being on a “10-day drug and alcohol binge.”

8 While a suspect's being armed is not by itself dispositive of Mitchell's claim, Glenn, 673
9 F.3d at 872, the Court nevertheless finds that the objective factors demonstrate that Mitchell posed
10 an immediate threat to public safety. Before the beanbags were deployed, Mitchell gripped the bat
11 as if he was prepared to swing it, regardless of whether he intended to hold it defensively or
12 otherwise. In other words, the video footage makes clear that Mitchell did not hold the bat, as he
13 claims, merely as a hood-prop or for any other purpose than to swing it. Such an assertion would
14 be supported by the facts if, e.g., Mitchell had ensured the bat was pointed toward the ground in a
15 nonthreatening manner or had dropped it. As Defendants point out, “[i]f the person is armed . . . a
16 furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat.”
17 George v. Morris, 736 F.3d 829, 838 (9th Cir. 2013). Additionally, Mitchell was acting erratically
18 and not responding to commands to drop the bat. He had been repeatedly asked and then
19 commanded to drop the bat, but he refused. Most importantly, Mitchell was wielding this bat near
20 the entrance/exit to the convenience store. Any person who exited the store would have been in
21 immediate danger from potentially being struck by Mitchell with the bat. Consequently, Mitchell's
22 wielding of the weapon in a position where any public person could have stumbled into his vicinity
23 created an immediate public threat creating a strong government interest in using significant but
24 nonlethal force.

b. The Severity of Mitchell's Crimes was Sufficient

26 The Court turns to the question of whether Mitchell's prior crimes, why the police had
27 stopped him in the first place, serve to compel a strong governmental interest. The Court finds that
28 it does. Mitchell ultimately pleaded guilty to attempted robbery charges for his conduct prior to

1 the incident in question, Category B felonies in Nevada. See Nev. Rev. Stat. §§ 205.060, 200.380.
2 In Miller v. Clark County, 340 F.3d 959 (9th Cir. 2003), the Ninth Circuit emphasized the
3 government's interest in apprehending criminals, and particularly felons, as a factor "strongly"
4 favoring the use of force. Miller, 340 F.3d at 964. Here, the officers reasonably suspected that
5 Mitchell had attempted robberies at two different convenience stores, on the same day they
6 confronted him at the convenience store. Accordingly, there existed a strong governmental interest
7 in using force to apprehend Mitchell, particularly given that the officers had confronted him at a
8 convenience store similar to those he had earlier attempted to rob. Moreover, from the perspective
9 of the officers at the time of the incident, they knew that he had mentioned a gun in one of his
10 previous robbery attempts. The Court therefore finds that a reasonable officer would find that
11 Mitchell's crimes had been severe enough to compel a strong governmental interest.

c. Mitchell's Resistance was Sufficiently Active

13 The Court also finds that the degree of Mitchell’s resistance to officer commands served
14 to compel a strong governmental interest in the use of less-lethal force. Courts distinguish between
15 active and passive resistance. Bryan, 630 F.3d at 830. But “[r]esistance,’ . . . should not be
16 understood as a binary state, with resistance being either completely passive or active. Rather, it
17 runs the gamut from the purely passive protestor who simply refuses to stand, to the individual
18 who is physically assaulting the officer.” Id. Courts “must eschew ultimately unhelpful blanket
19 labels and evaluate the nature of any resistance in light of the actual facts of the case.” Id. Here,
20 while Mitchell’s refusal to drop the bat might be permissibly characterized as passive resistance,
21 his refusal combined with his erratic behavior still created a public safety threat. See Nelson v.
22 City of Davis, 685 F.3d 867, 881 (9th Cir. 2012) (holding that “even passive resistance may support
23 the use of some degree of governmental force if necessary to attain compliance”). Given, as the
24 Court has found, that Mitchell posed an immediate threat to the safety of people inside the
25 convenience store, his continued refusal to drop his weapon for several minutes strengthened the
26 government’s interest in using less-lethal force to apprehend Mitchell.

d. Mitchell was Properly Warned

28 The Court finds that Mitchell was sufficiently warned that his refusal to release his weapon

would result in the use of force. “Appropriate warnings comport with actual police practice . . . [and] such warnings should be given, when feasible, if the use of force may result in serious injury.” Deorle, 272 F.3d at 1284. Here, Defendant Stephens warned Mitchell by shouting “if you do not put the bat down, I will shoot you and it will hurt.” He also yelled, just before firing, “beanbag, beanbag, beanbag.” While the Ninth Circuit has held that the latter warning is improper by itself to warn a suspect of less-lethal force, for the individual might “not know what this statement meant, or perhaps even what a beanbag shotgun is[,]” Glenn, 673 F.3d at 876, the Court finds that Stephens’ first warning was appropriate. Despite Defendant’s failure to mention the imminent use of the beanbag shotgun in particular, Mitchell was explicitly warned, following Deorle, that his refusal would result in serious injury. 272 F.3d at 1284.

e. Less Intrusive Alternatives were Generally Unavailable

12 Lastly, the Court finds that less intrusive alternatives were generally unavailable to the
13 officers. Officers “need not avail themselves of the least intrusive means of responding to an
14 exigent situation; they need only act within that range of conduct we identify as reasonable.” Scott
15 v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994). However, “police are ‘required to consider [w]hat

16 other tactics if any were available,’” and if there were “clear, reasonable and less intrusive
17 alternatives” to the force employed, that “militate[s] against finding [the] use of force reasonable.”
18 Bryan, 630 F.3d at 831 (quoting Headwaters Forest Def. v. Cnty. of Humboldt, 240 F.3d 1185,
19 1204 (9th Cir. 2000)). Here, the only concrete alternative argued by the parties was the potential
20 use of a taser instead of a beanbag shotgun. In his declaration, Defendant Stephens testified that
21 he had considered the use of his taser, but he determined that the thickness of Mitchell’s coat would
22 have rendered the taser ineffective. Mitchell does not provide any evidence to rebut this assertion
23 by Defendant Stephens that he considered alternate means of apprehending Mitchell. Given the
24 threat posed by Mitchell and his weapon, the Court generally finds no reasonable alternative to
25 less-lethal force that would have sufficed to apprehend him.

3. *Balance of Interests*

Finally, the Court weighs “the intrusion into [Mitchell’s] Fourth Amendment rights against [Stephens’] interest in apprehending [Mitchell] – that is, whether there is a reasonable fit between

1 [the] use of force and [Mitchell's] conduct.” Seidner v. De Vries, 39 F.4th 591, 600 (9th Cir. 2022).
 2 As discussed, the Ninth Circuit requires that a “strong governmental interest compels the
 3 employment of” a beanbag shotgun. Deorle, 272 F.3d at 1280. Given the Court’s findings relevant
 4 to the “objective reasonableness” factors above, the Court concludes that a strong governmental
 5 interest existed such that compelled the use of the beanbag shotgun. The strength of the
 6 government’s interest in using the less-lethal force lied in (1) Mitchell’s threat to employees and
 7 customers present in the convenience store, (2) the felonious character of his prior crimes including
 8 his mention of a firearm, (3) his refusal to drop the weapon he carried, (4) his warning that he
 9 would be subject to force if he continued to refuse, and (5) the general unavailability of less
 10 intrusive alternatives. As a matter of law, a jury could not reasonably conclude that the officers
 11 did not have a strong interest in apprehending Mitchell given these objective factors. As such,
 12 summary judgment is granted to Defendant Stephens on Mitchell’s first excessive force claim.

13 **ii. *Garcia’s Use of Lethal Force***

14 The Court turns to Mitchell’s second claim, Sgt. Garcia’s allegedly unconstitutional use of
 15 lethal force. As before, the Court balances “the nature and quality of the intrusion on the
 16 individual’s Fourth Amendment interests against the importance of the governmental interests
 17 alleged to justify the intrusion.” Garner, 471 U.S. at 8 (1985). Where deadly force, which
 18 “implicates the highest level of Fourth Amendment interests,” is used, “the issue is determining
 19 whether the governmental interests at stake were sufficient to justify it.” Vos v. City of Newport
 20 Beach, 892 F.3d 1024, 1031 (9th Cir. 2018) (quoting A.K.H. ex rel. Landeros v. City of Tustin,
 21 837 F.3d 1005, 1011 (9th Cir. 2016)).

22 The inquiry into the governmental interest generally involves an evaluation of the Graham
 23 factors, such as the Court conducted above. However, in the context involved here, “the Supreme
 24 Court has crafted a more definitive rule” for cases involving the “use [of] deadly force to apprehend
 25 a fleeing suspect[.]” Orn v. City of Tacoma, 949 F.3d 1167, 1174 (9th Cir. 2020). Officers may
 26 only use deadly force against a fleeing individual if “the officer has probable cause to believe that
 27 the suspect poses a threat of serious physical harm, either to the officer or to others.” Garner, 471
 28 U.S. at 3. The Ninth Circuit has held that the emphasis of this particularized rule “is the

1 specification of the threat . . . not the putative difference between ‘reasonable belief’ and ‘probable
 2 cause,’ that controls.” Price v. Sery, 513 F.3d 962, 970 (9th Cir. 2008). The imperative question,
 3 then, is whether Garcia had an objectively reasonable basis for believing that Mitchell posed a
 4 threat of serious physical harm to anyone. Taking the facts as they are depicted by video, the Court
 5 finds that Garcia’s use of lethal force was justified by an objectively reasonable belief that Mitchell
 6 posed an immediate threat of serious physical harm to others.

7 Simply put, the situation changed dramatically after Mitchell was struck with the beanbag
 8 rounds. Moments after being hit, Mitchell moved to face the entrance doors of the convenience
 9 store and swung the bat violently twice against the glass. Just after that, he moved to open the door
 10 and enter the convenience store. He appeared out of control and willing to wield the bat. Given the
 11 escalation of the situation, the Court finds that these objective factors taken together support
 12 Garcia’s reasonable belief that Mitchell posed a risk of serious bodily harm to the public.
 13 Mitchell’s violent swinging of the bat breaking the store windows and his movement to enter the
 14 store created a “tense, uncertain, and rapidly evolving” circumstance. Graham, 490 U.S. at 397.
 15 Thus, when Mitchell turned to enter the convenience store, the Court finds that Garcia “reasonably
 16 believed such force was necessary to protect . . . others from death or serious bodily harm.” Ting
 17 v. United States, 927 F.2d 1504, 1511 (9th Cir. 1991). Because the inquiry into “the use of deadly
 18 force is tied to the nature of the threat, not to the quantum of evidence required to believe in it,”
 19 the Court finds that Mitchell’s (1) adverse reaction to the beanbags, (2) decision to swing the bat
 20 strong enough to break the glass, and (3) movement into the store, where police believed there
 21 were members of the public, provide a sufficient basis for demonstrating that a reasonable officer
 22 would perceive a “threat of serious physical harm or worse.” Price, 513 F.3d at 970.

23 The Court finds that Mitchell fails to raise a genuine dispute of fact as to the nature of his
 24 threat. He argues that the decision to swing the bat and enter the store came about directly as a
 25 result of the unreasonable deployment of the beanbag shotgun. First, the Court has already found
 26 that the initial use of force with the beanbags was not unconstitutional. Additionally, even if such
 27 force was unconstitutional, the Supreme Court has held that courts may not “use[] another
 28 constitutional violation to manufacture an excessive force claim where one would not otherwise

1 exist.” City of Los Angeles v. Mendez, 581 U.S. 420, 428 (2017). Accordingly, Mitchell’s
 2 contention that an unconstitutional use of the beanbag rounds had directly caused the acts that were
 3 perceived by Garcia as threatening serious harm is immaterial to the Court’s inquiry. Rather, the
 4 Court looks to the objective factors discussed above and finds that there existed an objective basis
 5 for the reasonable belief that Mitchell posed an imminent threat of serious harm.

6 The Court therefore grants summary judgment insofar as the use of lethal force by
 7 Defendant Garcia was objectively predicated on a reasonable belief of an imminent threat of
 8 serious harm such that the intrusion on Mitchell’s constitutional right to be free of excessive force
 9 was justified.⁴

10 **V. CONCLUSION**

11 For the foregoing reasons, **IT IS ORDERED** that Defendants’ Motion for Summary
 12 Judgment (ECF No. 177) is **GRANTED**.

13 **IT IS FURTHER ORDERED** that Plaintiff’s Motion for Summary Judgment (ECF No.
 14 182) is **DENIED**.

15 **IT IS FURTHER ORDERED** that Plaintiff’s Motion for Newly Discovered Information
 16 (ECF No. 199) is **DENIED**.

17 The Clerk of Court is instructed to close this case.

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19 **DATED:** March 28, 2025.

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22 **RICHARD F. BOULWARE, II**
 23 **UNITED STATES DISTRICT JUDGE**

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⁴ The Court further finds the officers would also be entitled to qualified immunity even if the Court had not found their actions constitutional as there is no clearly established law indicating that their conduct in these circumstances was unlawful. Mullenix v. Luna, 577 U.S. 7, 11 (2015).